EVER-YIELD SDN BHD v. YAP KEAT CHOON & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
RAVINTHRAN PARAMAGURU JCA
MOHD NAZLAN GHAZALI JCA
[CIVIL APPEAL NOS: S-02(NCVC)(W)-1824-09-2018, S-02(NCVC)(W)-1825-09-2018, S-02(NCVC)(W)-1826-09-2018, S-02(NCVC)(W)-1827-09-2018, S-02(NCVC)(W)-1828-09-2018, S-02(NCVC)(W)-1829-09-2018, S-02(NCVC)(W)-1830-09-2018, S-02(NCVC)(W)-1831-09-2018, S-02(NCVC)(W)-1832-09-2018 & S-02(NCVC)(W)-1813-09-2018]
18 AUGUST 2022

Abstract – *(i) Under the common law principle enunciated in Re Duomatic Limited, anything that the shareholders of a company can do by formal resolution in a general meeting can also be performed by them informally if they unanimously assent to it. (ii) Even if all the directors per se agree, the principle cannot without more, be invoked. It can only be invoked if the directors are also the only shareholders of the company. If they have all approved in their capacities as directors, the fact that they are also the only shareholders would bring the principle into play.*

CIVIL PROCEDURE: *Action – Claim – Claim against companies – Claim for unpaid director's remuneration and repayment of personal loans, advances and cash made available to companies – Whether claim proven*

CIVIL PROCEDURE: *Action – Counterclaim – Counterclaim by companies against former director – Counterclaim for cash withdrawn from company's accounts, monies received for cash sales and funds caused to be paid to persons without justification – Whether counterclaim proven*

COMPANY LAW: *Shareholders – Resolutions – Remuneration of directors – Claim for unpaid director's remuneration – Principle in Re Duomatic Limited – Whether there was assent of all shareholders on remuneration – Whether there was resolution passed by directors who constituted all of shareholders – Whether resolution deemed to have been passed by shareholders at general meeting – Whether claim for unpaid director's remuneration proven*

These appeals arose from ten writ actions commenced by the respondent, each against a different but related appellant company, all of which suits were jointly tried at the High Court. The ten appellant companies, all family-related entities, were involved in the business of saw milling and oil palm plantation. In the High Court, the respondent claimed against the appellants

for, *inter alia*, (i) unpaid director's remuneration; (ii) repayment of personal loans, advances and cash made available to the relevant appellant companies; and (iii) damages for unlawful termination of directorship and employment in the appellant companies. Three of the appellant companies, specifically Ever-Yield Sdn Bhd ('Ever-Yield'), Aikbee Timbers (Sabah) Sdn Bhd ('Aikbee') and Sapatanian Sdn Bhd ('Sapatanian') reacted by counterclaiming against the respondent for: (i) cash withdrawn by the respondent from the relevant appellant companies' accounts; (ii) monies received by the respondent for the cash sales of sawn timber by the relevant appellant companies; and (iii) funds of relevant appellant companies caused by the respondent to be paid to persons, including his nephew and son, without justification. The High Court allowed the respondent's claims and dismissed the appellants' counterclaims. Hence, the present appeals.

Held (allowing appeals on main claim and counterclaim in part)
Per Mohd Nazlan Ghazali JCA delivering the judgment of the court:

(1) The principle in *Re Duomatic Limited* ('*Duomatic* principle') was essentially a common law principle of decision-making by shareholders through informal but unanimous consent. This means that anything that the shareholders of a company can do by formal resolution in a general meeting can also be performed by them informally if all of them assent to it. The principle may be invoked even if the constitution of the company specifies a particular procedure in relation to the subject matter of the decision. They can do away with the formality of passing a resolution such that in case of unanimous consent rendered by all the shareholders of a company, such consent would bind the company to act within its capacity. The basis of the *Duomatic* principle was that the assent of all the shareholders is necessary and that if the resolution passed by the directors who constituted all of the shareholders, such resolution is deemed to have been passed by the shareholders at a general meeting. (paras 47, 48 & 51)

(2) In respect of Ever-Yield, pursuant to art. 70 of its articles of association which requires remuneration to be determined by the company in a general meeting, a general meeting of the shareholders of Ever-Yield had in fact been duly convened where it was resolved that the remuneration was to be fixed by the board of directors. The language in the said resolution could not have been any clearer. There was no specification by the resolution of the general meeting that the determination by the directors would thereafter necessitate a tabling before a general meeting or to the shareholders. As such, the determination made by the directors of Ever Yield on their remuneration was valid and the High Court's decision to allow the respondent's claim against Ever Yield was maintained. (paras 54, 59 & 60)

(3) Following the *Duomatic* principle, in the absence of any formal shareholders' resolutions, resolutions passed only by the directors in their capacities as directors only for the payments to be made to themselves would be inadequate and could only be accepted if there is evidence that all the shareholders in the particular company (whether or not they are directors) consented to the same. In the instant case, unanimous consent under the *Duomatic* principle in the nine other appellant companies could be readily established because all of these remuneration payments had been made with the full knowledge and consent of all the shareholders, making them properly authorised. These payments to the directors, including the respondent, were duly recorded in company statutory documents. (paras 66-67)

(4) The decision of the High Court allowing the respondent's claims for directors' remuneration – inclusive especially of directors' fees, salary and overtime, was affirmed in respect of all the ten appellants. In relation to Sapatanian however, the verdict of the High Court which awarded the respondent RM27,702.50 for this item of claim for director's remuneration was affirmed, instead of RM65,702.50 mentioned in the grounds of judgment of the High Court Judge ('HCJ'), given that this first-mentioned sum was also the amount pleaded by the respondent himself in the prayer in his statement of claim. (paras 80-81)

(5) There was no valid basis for appellate intervention in respect of the decision of the High Court allowing the respondent's claim for the balance of the loan in the sum of RM3,512,000 he had extended to Ever-Yield and his claims for cash of RM769,569.84 in exchange for cheques in Ever-Yield. There was sufficient evidence adduced by the respondent to support his claim whilst there was the clear absence of true rebuttal evidence from the appellants. The decision of the High Court in this respect was thus affirmed. (paras 100 & 101)

(6) A servant can be instantly dismissed when his conduct is such that it not only amounts to a wrongful act inconsistent with his duty towards his master but is also inconsistent with the continuance of confidence between them. Both of these considerations have been met herein given especially the seniority of the respondent's executive position, his suspension status (and removal from directorship) as well as the sizeable sum involved, all of which further underscored the gravity of the misconduct, which ought to have justified termination without notice. On evidence, the respondent, after his removal as director in the appellant companies and during the suspension of his executive position, did commit an act of misconduct by encashing cheques of Ever-Yield amounting to RM6,554,931.43 without authority. The claim for

compensation for dismissal without notice which was allowed by the High Court against Ever-Yield, Aikbee, Sapatanian, Belutanian Sdn Bhd, Lubah Plantation (S) Sdn Bhd and Realwood Enterprise Sdn Bhd was set aside. (paras 120-122)

(7) It was Ever-Yield's case, as pleaded in its counterclaim, that the respondent had made unauthorised withdrawals from Ever-Yield's account for his own benefit on 14 occasions, totalling RM2,845,154.85, the first of which was for the sum of RM1 million. In support of this counterclaim, Ever-Yield had produced evidence of payment vouchers that those amounts were withdrawn from Ever-Yield's bank account, during the time of the respondent's management of the appellant companies. There was merit in the claim by Ever-Yield against the withdrawal of the RM1 million. Therefore, the counterclaim of Ever-Yield in respect of the withdrawal of RM1 million only was allowed. The decision of the High Court was set aside to that extent only. The decision of the HCJ on the dismissal of the counterclaim on the remainder RM1,845,154.85 was affirmed. (paras 127, 128 & 133)

(8) It was in fact admitted by the respondent that not only both his nephew, Yap Chye Lai and his son, Yap Leong Wai were not under the employment of Ever-Yield and Sapatanian respectively, but the monies had also been paid allegedly as salaries and non-existent contracts, statutory deductions paid to the Lembaga Hasil Dalam Negeri, Employees Provident Fund and SOCSO – in favour of Yap Chye Lai by Ever Yield on various dates on ten occasions totalling RM151,323.60; and to Yap Leong Wai by Sapatanian in the total sum of RM79,853.66. Neither of the two were blood relatives of the late Tan Sit Seng (who had founded the main business entity, Sit Seng & Sons Realty Sdn Bhd). There was no documentary or other evidence to substantiate the respondent's testimony that Tan Sit Seng consented to such payment to Yap Chye Lai and Yap Leong Wai. As such, Ever Yield's counterclaim for RM151,323,60 and Sapatanian's counterclaim for the aggregate sum of RM79,853.66 were allowed. The decision of the High Court on this was set aside. (paras 136, 137, 145 & 149)

(9) Aikbee pleaded that there was a sum of RM438,723.63 of what was described as 'cash in hand' – being monies received by the respondent for the cash sales of sawn timber by the appellant, which remained unaccounted for by the respondent. There was, however, never any demand made by the appellant (Aikbee) to the respondent for this sum until after the counterclaim was filed, where the allegation was first made, raising strong suspicions that the same was an afterthought. Aikbee's counterclaims for the three amounts against the respondent were dismissed. The decision of the High Court was affirmed. (paras 167, 168 & 172)

(10) The court allowed the appeal in part against the decisions of the High Court on the main claim and the counterclaims. The decisions of the High Court were accordingly set aside to such extent. Other than what had been referred to in the grounds of judgment, any other decision of the High Court not addressed herein (not raised by the parties at the hearing) were affirmed. (paras 173 & 174)

Case(s) referred to:

Aziz Muhamad Din v. PP [1997] 1 CLJ Supp 523; [1997] 1 BLJ 523 HC ***(refd)***
Chiam Heng Hsien v. Jurong Town Corp [1986] 1 CLJ 262; [1986] CLJ (Rep) 805 ***(refd)***
Ebrahimi v. Westbourne Galleries Ltd & Ors [1972] 2 All ER 492 ***(dist)***
EiC Services Ltd v. Philips [2003] 3 All ER 804 ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Giga Engineering & Construction Sdn Bhd v. Yip Chee Seng & Sons Sdn Bhd & Anor [2015] 9 CLJ 537 FC ***(refd)***
Ho Hup Construction Company Bhd v. Woo Thin Choy [2015] 9 CLJ 706 CA ***(refd)***
International Times & Ors v. Leong Ho Yuen [1980] 1 LNS 31 FC ***(refd)***
Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 4 CLJ 1 CA ***(refd)***
Kabushiki Kaisha Ngu v. Leisure Farm Corporation Sdn Bhd & Ors [2016] 8 CLJ 149 FC ***(refd)***
Kerajaan Malaysia v. Global Upline Sdn Bhd & Another Appeal [2016] 1 LNS 1158 CA ***(refd)***
Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***
Menon v. The Brooklands (Selangor) Rubber Co Ltd [1967] 1 LNS 100 HC ***(refd)***
Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***
Ong Ah Long v. Dr S Underwood [1983] 2 CLJ 198; [1983] CLJ (Rep) 300 FC ***(refd)***
Re Duomatic Ltd [1969] 1 All ER 161 ***(foll)***
Re Ravenhart Service (Holdings) Ltd Reiner v. Gershinson And Others [2004] 2 BCLC 376 ***(refd)***
Said Dharmalingam Abdullah v. Malayan Breweries (Malaya) Sdn Bhd [1997] 1 CLJ 646 SC ***(refd)***
Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***
Sinclair v. Neighbour [1966] 3 All ER 988 ***(refd)***
Theow Say Kow v. Graceful Frontier Sdn Bhd & Ors [2020] 1 LNS 52 CA ***(refd)***
UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***
Wong See Yaw & Anor v. Bright Packaging Industry Bhd [2016] 6 CLJ 465 HC ***(refd)***
Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal [1995] 3 CLJ 344 FC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 132(1), (2), 147(3), (6), 169
Companies Act 2016, s. 465(h)
Employment Act 1955, s. 14(1)
Evidence Act 1950, s. 103
Rules of the Court of Appeal 1994, r. 5
Companies Act 1948 [UK], s. 222(f)

For the appellants - Marina Tiu, Chieng Ho Ming & Joyce Blasius; M/s Yap Chin & Tiu
For the respondent - Tsang Hieng Yee & Chin Ye Shan; M/s Tsang & Co

[Editor's note: For the High Court judgment, please see Yap Keat Choon v. Ever-Yield Sdn Bhd [2020] 1 LNS 980 (overruled in part).]

Reported by Lina E

JUDGMENT

Mohd Nazlan Ghazali JCA:

Introduction

[1] These appeals arose from ten writ actions commenced by the respondent, each against a different but related appellant company, all of which suits were jointly tried at the High Court where the learned High Court Judge allowed the claims of the respondent as the plaintiff, and dismissed the respective counterclaims filed by three of the ten appellants as the defendants, all of whom now appealed against the said decisions. We heard the ten appeals together, by way of remote communication technology *via* Zoom. We allowed the appeal in part in respect of the main claim as well as the counterclaims.

Key Background Facts

[2] The dispute was between individuals related by marriage, revolved around the control of company businesses and appeared to have manifested itself in the fall out following the death of the family patriarch, Tan Sit Seng @ Lim Yen Siew who had founded the main business entity, Sit Seng & Sons Realty Sdn Bhd ("Sit Seng & Sons"), also one of the appellants herein, way back on 9 November 1979, with subsidiaries in Peninsular Malaysia and in East Malaysia. Yap Keat Choon, the plaintiff at the High Court and the respondent now before us, was a brother-in-law of Tan Sit Seng.

[3] Between the two, the arrangement was for the respondent to manage the business operations of Sit Seng & Sons in Sabah whilst Tan Sit Seng focussed on running the operations in the Peninsular.

[4] Tan Sit Seng passed away in October 2013.

[5] Following his demise, resolutions were several months later passed to remove the respondent as a director in all the ten defendant companies (the ten appellants herein; in the case of Ever Yield on 27 October 2014). On 29 October 2014 the respondent was informed of his removal as a director from the boards of the ten appellant companies (among others *via* a letter from Sit Seng & Sons dated 28 October 2014). The respondent's executive positions in the relevant appellant companies were also terminated the day after, on 30 October 2014.

[6] The ten appellant companies which had each been separately sued by the respondent at the High Court, in the order they were registered, as follows:

(i) Ever-Yield Sdn Bhd ("Ever Yield");

(ii) Aikbee Timbers (Sabah) Sdn Bhd ("Aikbee");

(iii) Borneo Glow Sdn Bhd ("Borneo Glow");

(iii) Belutanian Sdn Bhd ("Belutanian");

(iv) Lubah Plantation (S) Sdn Bhd ("Lubah Plantation");

(v) Realwood Enterprise Sdn Bhd ("Realwood");

(vi) Sapatanian Sdn Bhd ("Sapatanian");

(vii) Sit Seng & Sons Realty Sdn Bhd;

(viii) Syarikat Tani Desa Sdn Bhd ("Tani Desa"); and

(x) Upaya Abadi Sdn Bhd ("Upaya Abadi").

[7] The ten appellants, all family related entities, are involved in the business of saw milling and oil palm plantation and all are wholly owned by Sit Seng & Sons, apart from Aikbee which is solely owned by Aikbee Resources Sdn Bhd, and Borneo Glow which shares are held by the respondent at only 5% and Ever Yield at 95%.

The Claims And Counterclaims And The Decisions Of The High Court

[8] It is apposite that what the respondent sought from the court against the appellants be stated. Essentially the reliefs prayed for by the respondent at the trial court concerned payments which he claimed was due to him from the appellant companies.

[9] Thus, as pleaded, as against Ever Yield, he asked for (i) the sum of RM448,703.23 being unpaid director's fees, salary and statutory deductions for the period of the financial years 2013 and 2014; (ii) the sum of RM3,512,000 being the balance of a personal loan to Ever Yield; (iii) the sum of RM769,569.84 being the cheques given by Ever Yield to the respondent in exchange for cash from him; and (iv) a declaration that the termination of the respondent as a director and chief executive officer of Ever Yield is unlawful, null and void and of no effect, with damages to be assessed for wrongful termination of service as director and chief executive officer of Ever Yield.

[10] In its decision, the High Court allowed the claims, in the aggregate total sum of RM4,883,361.07. We observed that the total figure should rightfully be RM4,883,273.07 instead, as pleaded, inclusive of the award of RM153,000 being damages *in lieu* of notice (set at six months' notice under common law at RM25,500 per month) (but see below).

[11] Secondly, in respect of Aikbee, the claims were for (i) the sum of RM163,497.68 being unpaid director's fees, salary and statutory deductions for the period of the financial years 2012, 2013, 2014 and 2015; (ii) the sum of RM89,996.80 being damages *in lieu* of notice and termination benefits; (iii) a declaration that the termination of the respondent as a director and chief executive officer of Aikbee was unlawful, null and void and of no effect, with damages to be assessed for wrongful termination of service as director and chief executive officer of Aikbee.

[12] The High Court allowed the claim, totalling RM198,497.68, which included damages of RM35,000 *in lieu* of seven months' notice under common law at RM5k per month.

[13] Thirdly, as against Borneo Glow, the respondent prayed only for the sum of RM116,842.50 being unpaid director's fees, salary and statutory deductions for financial years 2009, 2010, 2011 and 2012. The High Court allowed the relief as prayed for, the payment of the said sum of RM116,842.50 to the respondent.

[14] Fourthly, in relation to Belutanian, the respondent claimed the reliefs of (i) the sum of RM27,702.50 being unpaid director's fees, salary and statutory deductions for financial years 2013 and 2014; (ii) the sum of RM2,055.55 being damages *in lieu* of notice and termination benefits; and (iiii) a declaration that his termination as a director and chief executive officer of Belutanian was unlawful, null and void and of no effect, with damages to be assessed for wrongful termination of service as director and chief executive officer of Belutanian.

[15] The High Court allowed the claim, awarding a total of RM33,702.50, which included RM6,000 in damages *in lieu* of three months' notice under common law at RM2k per month.

[16] Fifthly, as against Lubah Plantation, the reliefs prayed for by the respondent were (i) the sum of RM27,702.50 being unpaid director's fees, salary and statutory deductions for the financial years 2013 and 2014; (ii) the sum of RM2,055.55 being damages *in lieu* of notice and termination benefits; and (iii) a declaration that the termination of the respondent as a director and chief executive officer of Lubah Plantation was unlawful, null and void and of no effect, with damages to be assessed for wrongful termination of service as director and chief executive officer of Lubah Plantation.

[17] The High Court also allowed this claim, and awarded a total of RM33,702.50, which included RM6,000 in damages *in lieu* of three months' notice under common law at RM2k per month.

[18] Sixthly, in relation to the claim against Realwood, the respondent asked for the reliefs of (i) the sum of RM27,702.50 being unpaid director's fees, salary and statutory deductions for financial years 2013 and 2014;

(ii) the sum of RM2,055.55 being damages *in lieu* of notice and termination benefits; and (iii) a declaration that his termination as a director and chief executive officer of the Realwood was unlawful, null and void and of no effect, with damages to be assessed for wrongful termination of service as director and chief executive officer of Realwood.

[19] The High Court also allowed in favour of the respondent a total of sum of RM33,702.50 which included RM6,000 as damages *in lieu* of three months' notice under common law at RM2k per month.

[20] Seventhly, as against Sapatanian, the respondent prayed for (i) the sum of RM27,702.50 being unpaid director's fees, salary and statutory deductions for financial years 2013 and 2014; (ii) the sum of RM2,055.55 being damages *in lieu* of notice and termination benefits; (iii) the sum of RM139,127.80 being the cheques given by Sapatanian to the respondent in exchange for cash from him; and (iv) a declaration that the termination of the respondent as a director and chief executive officer of the Sapatanian was unlawful, null and void and of no effect, with damages to be assessed for wrongful termination of service as director and chief executive officer of Sapatanian.

[21] The High Court in its full grounds of judgment allowed RM168,885.85, which included RM6,000 as damages *in lieu* of three months' notice under common law at RM2,000 per month, as well as the payment of RM139,127.80 as claimed. However, at the conclusion of the hearing before us, it was clarified by parties that the High Court did not make any order in respect of the respondent's claim against Sapatanian for the RM139,127.80, being the cheques given by Sapatanian to the respondent in exchange for cash from him. There was also no appeal by the respondent in respect of this. As such, even though this item of claim was stated to be allowed in the full written grounds of the learned High Court Judge, and despite the parties submitting on this claim in their respective submissions at the hearing before us, we observed that there was in fact no appeal by the respondent against the sealed order of the High Court which did not make any order on this claim. Accordingly, we too made no order on the said claim by the respondent for the sum of RM139,127.80.

[22] Eighthly, ninthly and tenthly, as against Sit Seng & Sons, Tani Desa and Upaya Abadi, the respondent claimed the reliefs of the payments of the sums of RM22,591.78 (for financial years 2012, 2013), RM10,000 (for financial year 2013) and RM10,000 (for financial year 2013) being unpaid director's fees due from the respective three appellant companies. The High Court allowed these claims against the three as pleaded, and in the case of Sit Seng & Sons, with an increase in the sum awarded to RM27,702.50.

[23] As mentioned earlier, a number of the appellants, specifically three of them, Ever Yield, Aikbee and Sapatanian, reacted by counterclaiming against the respondent.

[24] As for Ever Yield, the company sought (i) the sum of RM2,845,154.85 on account of various unjustified withdrawals from Ever Yield effected through cash/cheque payments approved by the respondent himself; (ii) the sum of RM1,278,712 being the balance of sale proceeds for sludge oil sold by Ever Yield; (iii) the sum of RM164,000 caused by the respondent to be paid to one Goh Chin Hai under the guise of several contracts when there was no such contract or justification for the same; and (iv) the sum of RM151,323.60 caused by the respondent to be paid to his nephew – Yap Chye Lai on account of salary, non-existent contracts including statutory deductions made on Yap Chye Lai's behalf despite Yap Chye Lai not being an employee of Ever Yield.

[25] In respect of Aikbee, it alleged and claimed (i) the sum of RM200,000 being cash withdrawn by the respondent from Aikbee's account; (ii) the sum of RM440,000 drawn by the respondent from Aikbee's account in favour of Sit Seng & Sons which was never received by Sit Seng & Sons; and (iii) the sum of RM438,723.63 being monies received by the respondent for cash sales of sawn timber by Aikbee.

[26] As for the counterclaim by Sapatanian, the same was made against the respondent and his own son, one Yap Leong Wai, jointly and severally, for (i) the sum of RM56,676.86 being remuneration caused to be paid by Sapatanian to Yap Leong Wai despite the latter not being an employee of Sapatanian; and (ii) the sum of RM23,176.80 being employees provident fund, SOCSO and income tax contributions caused to be paid by the appellant company on behalf of the said Yap Leong Wai.

[27] The High Court however dismissed all the counterclaims by the three appellants against the respondent in their entirety.

The Main Issues In Contention

[28] We pause here to make the observation that the claims and counterclaims as raised in these appeals mainly concern the following principal issues:

(i) claims for the payment of unpaid director's remuneration;

(ii) claims for repayment of personal loans, advances and cash made available to the relevant appellant companies; and

(iii) claims for damages for unlawful termination of directorship and employment in the appellant companies.

[29] As for the counterclaims, the demands were though specific, more varied. The main counterclaims were for the repayment from the respondent of the following:

(i) cash withdrawn by the respondent from company accounts;

(ii) monies received by the respondent for the cash sales of sawn timber by the relevant appellant; and

(iii) funds of relevant appellant companies caused by the respondent to be paid to persons, including his nephew and son, without justification.

[30] In these appeals, we will undertake the requisite analysis based on the issues as fashioned generally above, which is consistent with the approach taken by the counsel for the parties, in their respective written as well as oral submissions before us. But first, a brief reference to our duty in hearing these appeals is not out of place.

Principles Of Appellate Intervention

[31] The central feature of appellate intervention is well-established. It is to ascertain whether or not the trial court had arrived at its decision or finding correctly on the evidence and on the basis of the governing law. The Federal Court in the case of *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1 held as follows:

> [14] In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention, *ie* to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention, *ie* that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.

[32] Thus, in the case of *Kerajaan Malaysia v. Global Upline Sdn Bhd & Another Appeal* [2016] 1 LNS 1158; [2017] 1 MLJ 170, the Court of Appeal held that an appellate court will not intervene unless the trial court is shown to be plainly wrong in arriving at its conclusion and where there has been insufficient judicial appreciation of the evidence.

[33] In the leading case of *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1 the Federal Court affirmed with unmistakable clarity that the principle on which an appellate court could interfere with findings of fact by the trial court is 'the plainly wrong test' principle.

[34] This important principle involves a number of circumstances, but must necessarily extend to situations where it can be shown that the impugned decision is vitiated with plain material errors, or where crucial evidence had been misconstrued, or where the trial judge had so manifestly

not taken proper advantage of having seen and heard the witnesses or not properly analysed the entirety of the evidence before him, or where a decision was arrived at without adequate judicial appreciation of the evidence such as to make it rationally unsupportable.

[35] Above all, the Federal Court in *Ng Hoo Kui* established that the criterion that is central to appellate intervention must remain that deference to the trier of fact is still the rule and not the exception. And the plainly wrong test should not be used by the appellate court as a means to substitute the impugned decision with its own.

Analysis And Findings Of This Court

Claims By The Respondent

Director's Remuneration

[36] In *Wong See Yaw & Anor v. Bright Packaging Industry Bhd* [2016] 6 CLJ 465 the High Court usefully in the following passages summarised the law on directors' remuneration, which we would readily subscribe to:

> **Law On Directors' Remuneration**
>
> [27] It is apposite that I now state the law applicable to the matter in contention. It is a well-established common law rule in company law which is elementary and uncomplicated, but does not appear to be fully understood in practice by corporations, including even public listed companies. It is this. Directors of a company have no authority to expend on the funds of the company to pay themselves or any one of their number, unless they are authorised for such purpose by the company's constitution in its M&A or the payment is approved by the members of the company (see *In Re George Newman And Co* [1895] 1 Ch 674). Bowen LJ in *Hutton v. West Cork Railway Co* (1883) 23 Ch 654 stated as follows:
>
> > A director is not a servant [*ie*, employee]. He is a person who is doing business for the company, but not upon ordinary terms. **It is not implied from the mere fact that he is a director that he is to have right to be paid for it**. In some companies ... there is a special provision for the way in which the directors should be paid; in others there is not. If there is a special provision for the way in which they are to be paid, you must look to the special provision to see how to deal with it. **But if there is no special provision their payment is in the nature of a gratuity**.
>
> [28] A director of a company therefore does not have a right to be remunerated as of right by virtue of his office except as provided by its constitution or approved by its shareholders. In *Re Richmond Gate Property Co Ltd* [1964] 3 All ER 936, it was held that in the absence of any resolution concerning the amount of directors' remuneration passed pursuant to the articles in general meeting prior to the liquidation of the company, the directors were thus not entitled to any remuneration. In *Guinness Plc v. Saunders* [1990] 2 AC 663, the articles provided that the

remuneration of the director performing services for the company outside the scope of the ordinary duties of a director was to be determined by the company's Board as a whole. The House of Lords held that as no determination had been made by the Board, the relevant director was not entitled to any remuneration. The director in question had been given special remuneration by a committee of the Board, an act which the committee had no authority to perform. Accordingly the director had to return the remuneration. Even his claim for *quantum meruit* was refused since in that case the parties could be said to have agreed how remuneration was to be decided, but instead not followed.

[29] Neither is the fact that a person is a director of a company in itself makes that person an employee, which would otherwise entitle him to remuneration as an employee.

[30] But most importantly, this rule on directors' remuneration emanates from the principle that a director stands in a fiduciary relationship *vis-à-vis* the company he serves. Lord Porter in *Regal (Hastings) Ltd v. Gulliver* [1967] 2 AC 134 had this to say:

> Directors, no doubt, are not trustees, but they occupy a fiduciary position towards the company whose board they form.

[31] In *Hospital Products Ltd v. United States Surgical Corp* [1984] 156 CLR 41, Mason J said thus:

> ... the fiduciary's duty may be more accurately expressed by saying that he is under an obligation not to promote his personal interest by making or pursuing a gain in circumstances in which there is a conflict or a real or substantial possibility of a conflict between his personal interests and those of the persons whom he is bound to protect.

[32] A number of facets to the requirements governing the discharge of the role of a director as a fiduciary is enacted in the Companies Act 1965, chief amongst which is the duty to act in good faith in the best interest of the company under s. 132(1) and the prohibition against improper use of company's property, position, corporate opportunity or competing with the company under s. 132(2). Directors deciding to remunerate themselves in the absence of any authorisation by general meeting or any provision in the articles would clearly be infringing their role as fiduciaries and violate these statutory requirements, risking the penalty of imprisonment upon conviction, and being liable to the return of the secret profits or damages (see for instance the Privy Council's decision in *Mahesan v. Malaysian Government Officers Co-Operative Housing Society Ltd* [1974] 1 LNS 83; [1978] 1 MLJ 149). The clearest pronouncement by the local courts on this point yet may be found in the judgment of Raus J (as His Lordship then was) in the case of *Shanmugam Paramsothy v. Thiagarajah Pooinpatarsan & Ors* [2001] 8 CLJ 683; [2004] 5 MLJ 31, where His Lordship ruled most instructively as follows:

> ... directors have no right to be paid for their services, and cannot pay themselves or each other or to make presents to themselves out of the company's assets, unless authorised to do so by the instrument which regulates the company or by the shareholders at a properly convened meeting.

The principles of law governing payments by companies of remuneration such as fees, allowances, and other benefits to directors are therefore free from any ambiguity.

...

[42] Whilst the position is well established, the appellants' interpretation of the applicability of the rule is manifestly erroneous. It is wrong to state that remuneration of directors, depending on type of payment, is either under the purview of directors or the shareholders. This is a wholly incorrect and glaringly incomplete premise to embark on an analysis of the key points in issue. As stated earlier, the starting position in law must always be the common law rule that is already firmly and well entrenched in the corpus of the company law in this country that directors have no right to be remunerated unless approved by shareholders by way of a resolution passed at a general meeting or provided for in the articles. In this regard, it should also be observed that the articles that are set out in Table A of the Fourth Schedule to the Companies Act 1965, adopted by many companies provide for the wider term of "remuneration" instead of merely "directors' fees" to be subject to the determination by the shareholders in general meeting. Regulations 70 of Table A states the following:

> The remuneration of the directors shall from time be determined by the company in general meeting. That remuneration shall be deemed to accrue from day to day. The directors may also be paid all travelling, hotel, and other expenses properly incurred by them in attending and returning from meetings of the directors or any committee of the directors or general meetings of the company or in connection with the business of the company.

[43] As such, one can only justify payments by a company to its directors, for whatever purpose, if it is done either on the basis of a shareholder's approval or it being duly authorised by the articles.

(emphasis added)

[37] A principal argument advanced by the appellants in the instant case before us against the decision of the High Court granting the respondent's claims for directors fees, salary and overtime from all the ten appellant companies is that the learned High Court Judge misdirected himself when he applied the principles in the leading company law cases of *Re Duomatic Ltd* [1969] 1 All ER 161 and *Ebrahimi v. Westbourne Galleries Ltd & Ors* [1972] 2 All ER 492 without undertaking an analysis if or to what extent the same did apply to the facts and circumstances of the case before him.

[38] The appellants further submitted that the learned High Court Judge failed to appreciate that there was no resolution at all for the directors' fees claimed by the respondent in respect of Sit Seng & Sons and Aikbee. For Borneo Glow there was also no resolution for the directors' fees claimed for the year 2010. In addition, there was no evidence that the amount of his director's fees was approved by the companies in a subsequent general meeting as required by respective appellant companies' articles of association.

[39] Further, there were no provisions on remuneration in the respective articles of association to be given to directors in relation to Belutanian, Sapatanian and Tani Desa in the first place. And no evidence was adduced to the effect that the board of directors or the appellant companies had actually approved salary to the respondent or even produced any contract of his executive position.

[40] For present purposes, we will deal with these two cases in summary fashion. In *Ebrahimi v. Westbourne Galleries Ltd*, the House of Lords ruled that *quasi*-partnership principles could be applied within the framework of an incorporated company. Lord Wilberforce, who delivered the leading judgment, held that the foundation lies in the words 'just and equitable' in s. 222(f) of the English Companies Act 1948.

[41] These words, as similarly found in s. 465(h) of our Companies Act 2016, are stated to be a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own, and that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged into the company structure. In the case of a small company therefore the rights and obligations of a company encompass more than the basic company law requirements.

[42] The 'just and equitable' provision enables the court to subject the exercise of legal rights to equitable considerations, concerning personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

[43] Equitable considerations can therefore come to be applied where an association was formed or continued on the basis of a personal relationship, involving mutual confidence for example where a pre-existing partnership has been converted into a limited company, when an agreement, or understanding, that all, or some of the shareholders are to participate in the conduct of the business; and when there is restriction upon the transfer of the members' interest in the company in that if confidence is lost, a member cannot exit.

[44] The core question in *Ebrahimi* was whether it was just and equitable for the company to be wound up. The crucial context was the removal of a director who was in equal partnership with the other director until that partnership was incorporated. The court held that the small size of the company was insufficient to justify the imposition of equitable considerations, and that the considerations then set out by the court essentially concerned the relationship between shareholders.

[45] What then is the relevance of *Ebrahimi* to the instant case before us? We say, none at all. The reason is plain enough. The *Ebrahimi* principle is predicated on the parties being first and foremost shareholders in the subject entity. In *Ebrahimi*, since the appellant had been excluded from being involved in the management of the company against his reasonable expectations, and was unable effectively to dispose of his interest, the company was ordered to be wound-up.

[46] In the appeals before us, quite apart from the clear difference in the factual matrix between *Ebrahimi* and these cases, whilst the respondent here might have been removed from the management of the appellant companies, he was never a shareholder in any of these entities (apart from in Borneo Glow) in the first place. The learned High Court Judge's reliance on *Ebrahimi* is therefore misplaced.

[47] The same, however, cannot be said of the case of *Re Duomatic Ltd*. The *Duomatic* principle is essentially a common law principle of decision-making by shareholders through informal but unanimous consent. This originates from the English case of *Re Duomatic Ltd* [1969] 1 All ER 161 where Buckley J held:

> Where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be.

[48] This means that anything that the shareholders of a company can do by formal resolution in a general meeting can also be performed by them informally if all of them assent to it. The principle may be invoked even if the constitution of the company specifies a particular procedure in relation to the subject matter of the decision. They can do away with the formality of passing a resolution such that in case of unanimous consent rendered by all the shareholders of a company, such consent would bind the company to act within its capacity.

[49] As such, in *Re Duomatic*, even though directors' salaries had been paid without the authority of a formal shareholders' resolution, the agreement of the two directors who held all the voting shares but who did not constitute themselves at a shareholders' meeting was ruled to have constituted a ratification of the payment of unauthorised salaries.

[50] The *Duomatic* principle is in practice especially relevant for small companies with the same individuals acting as directors and shareholders. This was not the situation which concerned the respondent since despite being a director on the boards of the appellants, was at the same time a shareholder only in Borneo Glow.

[51] The appellants' counsel was as such correct in submitting that the basis of the *Duomatic* principle is that the assent of all the shareholders is necessary and that if the resolution passed by the directors who constituted all of the shareholders, such resolution is deemed to have been passed by the shareholders at a general meeting.

[52] In the final analysis, the shareholders of the company, all of them, must somehow demonstrate consent. If they have all approved in their capacities as directors, the fact that they are also the only shareholders would bring the *Duomatic* principle into play. As such, the reliance by the respondent on the case of *Theow Say Kow v. Graceful Frontier Sdn Bhd & Ors* [2020] 1 LNS 52, which suggested that the unanimity of all the directors (but not also all shareholders) would activate the *Duomatic* principle, specifically to the following passage (at para. 192) is misconceived:

> ... if all the directors **or** shareholders agree to a particular course of conduct or transaction which is honest and *intra vires* the company ... the matter done will be upheld notwithstanding the fact that the matter was not done in the required form.
>
> (emphasis added)

[53] The principle, we emphasised, was about the unanimity of all the shareholders. We therefore highlight that even if all the directors *per se* agree, the *Duomatic* principle cannot, without more, be invoked. It can only be if, in this example, the directors are also the only shareholders of the company.

[54] Now, focusing in particular on the appellant companies *vis-a-vis* the issue of the claims by the respondent for director remuneration which included directors' fees, salary and overtime, in respect of Ever Yield, we however observed that pursuant to art. 70 of its articles of association which requires such remuneration to be determined by the company in a general meeting, a general meeting of the shareholders of Ever Yield had in fact been duly convened where it was resolved that the remuneration was to be fixed by the board of directors.

[55] Article 70 of Ever Yield's articles of association not uncommonly states:

> The remuneration of the directors shall from time to time be determined by the company in general meeting ...

[56] Ever Yield therefore did, as was usual for companies of similar structure and size, then hold a "paper AGM" pursuant to s. 147(6) of the Companies Act 1965 which provided that in the case of a wholly-owned

subsidiary, like Ever Yield, a minute signed by a corporate representative appointed under s. 147(3) shall, for all purposes, be deemed to have been duly made, performed, or passed at an ordinary general meeting or an extraordinary general meeting of the company. In that AGM of Ever Yield which was deemed to have taken place on 31 October 2013, it was resolved, among others, that:

> Remuneration to the Directors of the Company to be fixed by the Board of Directors.

[57] Consequently, on 30 December 2013, the board of directors of Ever Yield did pass by way of a circular resolution for directors' fees in the following terms:

> That the Director's fee for the services rendered for the financial year ended 30-04-2014 be as follows (Authorities given by AGM on 31-10-2013 to Board of Directors to approve the fees)
>
> | | |
> |---|---|
> | Mr Yap Keat Choon | RM 70,000.00 |
> | Mr Tan Aik Hooi | RM 30,000.00 |
> | Mr Tan Aik Hong | RM 50,000.00 |
> | Mr Tan Aik Chong | RM 70,000.00 |
> | | RM220,000.00 |

[58] The appellants submitted that the remuneration as resolved by the board of directors as aforesaid was not put to the company in a subsequent general meeting which the appellants argued was mandated by the said art. 70. The appellants made the same argument in respect of the other appellant companies, where there were also no subsequent general meetings to approve the directors' fees resolved by the relevant and respective boards of directors. A similar arrangement was followed in the prior financial year, which ended on 30 April 2013.

[59] We disagreed. The language in the said Ever Yield resolution could not have been any clearer. That the approving authority is the general meeting of shareholders is indisputable but as shown above the said authority had decided, not unusually, that the remuneration was to be determined by the board of directors. And the board of Ever Yield did in turn resolve the quantum of remuneration for the directors. There was no specification by the resolution of the general meeting that the determination by the directors would thereafter necessitate a tabling before a general meeting or to the shareholders. There was no necessity to call in aid the *Duomatic* principle.

[60] As such, the determination made by the directors of Ever Yield on their remuneration was valid and the High Court's decision to allow the respondent's claim against Ever Yield, is maintained.

[61] For clarity it should be stated that the Companies Act 1965 was the applicable statute in force then, given the suits in these appeals concerned matters which took place prior to the coming into effect of the Companies Act 2016.

[62] As for the claims by the respondent against the other appellant companies, we acknowledged the absence of any relevant shareholders resolution. We observed that the articles of association of most of these other companies – Sit Seng & Sons (in its art. 93), Lubah Plantation (art. 88), Realwood (art. 70), Borneo Glow (art. 70), Aikbee (art. 93) and Upaya Abadi (art. 76) – also not unexpectedly provide for the requirement for shareholders' approval for directors' remuneration which are similarly worded to Ever Yield's art. 70 in that the remuneration of the directors shall be determined from time to time by the company in general meeting.

[63] No similar or any provision on directors' remuneration though appears to exist in the articles of Belutanian, Sapatanian and Tani Desa.

[64] Nevertheless, despite the absence of any shareholders' approval (and for the said three appellant companies, even the absence of the relevant provisions in the articles), the directors of these ten appellant companies did resolve on the payment of directors' fees. For example, for Borneo Glow, the directors resolved on 24 December 2009 and 29 December 2011, 29 December 2012, Belutanian (30 December 2013), Lubah Plantation (30 December 2013), Realwood (30 December 2013), Sapatanian (30 December 2013), Tani Desa (30 December 2013), and Upaya Abadi (30 December 2013).

[65] This is where we agreed that the *Duomatic* principle could be invoked, since it recognises that a company's shareholders can legitimately give approval through unanimous consent not necessarily in the required form in a general meeting.

[66] We must reiterate that following *Duomatic*, in the absence of any formal shareholders' resolutions, resolutions passed only by the directors in their capacities as directors only for the payments to be made to themselves would be inadequate and can only be accepted if there is evidence that all the shareholders in the particular company (whether or not they are directors) consented to the same.

[67] In the instant case, we find on evidence that unanimous consent under the *Duomatic* principle in the nine other appellant companies can be readily established. This is because all of these remuneration payments had been made with the full knowledge and consent of all the shareholders, making them properly authorised. These payments to the directors, including the respondent, were duly recorded in company statutory documents.

[68] The fact that all the shareholders assented was not difficult to show, because significantly, all the appellant companies were in fact wholly owned by only a single shareholder namely Sit Seng & Sons. This is with the exception of three appellants. First, Borneo Glow, which is owned by two members, namely Ever Yield (95%) (in turn wholly owned by Sit Seng & Sons) and the respondent (5%) himself, and secondly, Aikbee, which sole shareholder is Aikbee Resources Sdn Bhd. Thirdly, of course Sit Seng & Sons itself.

[69] It is true that there is no evidence of a positive conduct on the part of any of the shareholders, *albeit* in most cases being a sole shareholder, specifically assenting to the making of such payments to the directors. There were as we have observed earlier, no shareholders' resolutions authorising such payments for directors' remuneration (except for Ever Yield). However, such manner of demonstrating consent is not a requirement of the *Duomatic* principle, which it should be emphasised, and again reiterated that the assent by shareholders need not be in any prescribed form.

[70] In our judgment, it would also be sufficient for the *Duomatic* consent to be manifested in the conduct of the shareholders who do not raise any objection in any form against decisions having relevance, in this case, to the payments of directors remuneration in forums where such objections could have been highlighted or in any other situations, to the extent that subsequent denial of such consent would be inequitable and ought to be estopped.

[71] We find support for this stance in the English case of *Re Ravenhart Service (Holdings) Ltd Reiner v. Gershinson And Others* [2004] 2 BCLC 376 where Etherton J referred to the *Duomatic* principle when mentioning the case of *EiC Services Ltd v. Philips* [2003] 3 All ER 804, and observed as follows:

> Although the principle has been characterised in somewhat different ways in different cases, I do not consider that that is because its nature or extent is in doubt or the subject of debate. The difference in language is attributable to the fact that the principle will have been expressed by reference to the particular facts of the case. The essence of the *Duomatic* principle, as I see it, is that, where the articles of a company require a course to be approved by a group of shareholders at a general meeting, *that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval. Whether the approval is given in advance or after the event, whether it is characterised as agreement, ratification, waiver, or estoppel, and whether members of the group give their consent in different ways at different times, does not matter.* (emphasis added)

[72] We observed that in these appeals, these remuneration payments had been specifically recorded in the audited financial statements of the relevant appellants, which were payable to all directors and not just the respondent, and which amounts were generally similar in size as in prior years, all without any issues. Needless to say, these audited financial statements were

prepared in fulfilment of the statutory obligations of company directors pursuant to s. 169 of the Companies Act 1965 to lay before the company at its annual general meeting, the company's profit and loss account, balance sheet and directors' report.

[73] Despite the same however, no evidence – whether from the statutory documents of the appellant companies or other documents – had been shown by any of the appellants to exhibit any objection by any of the relevant shareholders. Not Sit Seng & Sons as the sole shareholder of Ever Yield, Belutanian, Lubah Plantation, Realwood, Sapatanian, Tani Desa and Upaya Abadi, and neither Ever Yield as a shareholder of Borneo Glow nor Aikbee Resources Sdn Bhd as the shareholder for Aikbee Timbers. On the contrary, the sole shareholder would invariably be the corporate representative of the relevant appellant companies under the said s. 147(3) in the fulfilment of the requirement for the companies' general meetings. These general meetings in turn required the presentation of the audited financial statements, containing among many others, details on directors' remuneration.

[74] The same analysis would apply to the respondent's claim for directors' remuneration against Sit Seng & Sons itself, where the shareholders of Sit Seng & Sons at the material time were eight individuals namely Tan Sit Seng (before his demise), Tan Aik Thor, Tan Aik Hong, Tan Cheng Laye, Tan Aik Hooi, Yap Kin Thai, Tan Aik Kiong and Tan Aik Chong.

[75] From the appeal records it is not difficult to find that for Sit Seng & Sons, note 26 of the audited accounts of the company for the financial year ended 30 April 2012 and note 24 of the accounts for the following year ended 30 April 2013 did clearly specify the aggregate amounts of the directors' fees and directors' remuneration, as two distinct items to be deducted from the profits before tax of the company, which also included the corresponding figures for the immediately preceding year, on company as well as on group basis. No evidence had been adduced to suggest that any of the eight shareholders of Sit Seng & Sons had ever expressed any disagreement with such directors' remuneration which had been so specifically documented in the company's statutory and financial document. Most of the shareholders were also the directors during the material period in any event.

[76] Similar disclosures were made in the audited statements of the other appellant companies. But again, there was no evidence whatsoever that any of the shareholders of any of the appellant companies did not agree to any of the remuneration payments to any one director of the appellants. Audited financial statements are statutorily required to be accompanied with a directors' report. These documents are signed off by two directors duly authorised by the board for such purpose. These documents must be approved by the board of directors before they are presented to the shareholders at the AGM.

[77] Thus, quite apart from the shareholders, there was similarly no evidence to show any of the directors at the material time had raised any objection whatsoever. There were no issues whatsoever in the trial, let alone in the pleadings *vis-à-vis* the status of the audited financial statements of any of the appellant companies. There was as such no evidence at all that these payments of directors' remuneration and directors' fees to the directors as recorded in the audited financial statements of the appellant companies was objected to in any of the financial years in whatever form of evidence.

[78] On the contrary, there were other documentary evidence which shows that the appellant companies had agreed to pay, as plainly acknowledged and recorded in the companies' ledger and records as well as in EA forms and tax submissions that such directors' fees and other remuneration were payable. Resolutions must accordingly have been passed by the board of directors of all the appellant companies for the payments to be made. The directors' fees were, it bears emphasis, payable to all the directors of the respective appellant companies, and certainly not just the respondent. Again, there was no evidence in the relevant minutes that any of the directors had disagreed.

[79] Not only that. It ought to be stressed too that for all intents and purposes there was no rebuttal evidence from the appellants in the sense that the other directors or more crucially the shareholders at that material time in the appellant companies were not even called by the appellants to rebut or challenge the respondent's claim to the director's fees and remuneration if indeed such payments were never intended by the appellants to be made to the respondent.

[80] As such despite the analysis by the learned High Court Judge on the application of the cases of *Duomatic* and *Ebrahimi*, we found that his decision on the issue of directors' remuneration was not erroneous. The decision of the High Court allowing the respondent's claims for directors' remuneration – inclusive especially of directors' fees, salary and overtime is therefore affirmed in respect of all ten appellants.

[81] In relation to Sapatanian however, we agreed with the submission of the counsel for the appellants that the verdict of the High Court which was delivered on 30 July 2018 which awarded the respondent RM27,702.50 for this item of claim for director's remuneration was to be affirmed, instead of RM65,702.50 mentioned in the grounds of judgment of the learned High Court Judge dated 29 July 2020, given that this first-mentioned sum was also the amount pleaded by the respondent himself in the prayer in his statement of claim.

[82] It had also been pointed out to us upon clarification that the learned High Court Judge had allowed RM27,702.50 with respect to the respondent's claim for director's remuneration from Sit Seng & Sons when what he himself pleaded was a slightly lower sum of RM22,591.78. We

agreed to set aside the larger amount and gave judgment for the pleaded sum. As such, the appeal for this item of the claim was allowed to this extent only, by allowing judgment to be entered for the respondent for RM22,591.78 together with interest as claimed.

Personal Loans To Ever Yield And Cheques For Cash In Ever Yield

[83] As for the decision of the learned High Court Judge allowing the respondent's claim for the balance of a loan in the sum of RM3,512,000 and the cash of RM769,569.84 paid in exchange for Ever Yield cheques, the appellants submitted that the trial court had failed to consider the inherent improbability of the respondent's claim of having loaned Ever Yield such total of RM12,300,000 in cash and having given Ever Yield the sum of RM769,569.84.

[84] The appellants questioned how the respondent could have managed to provide this large sum of monies from the respondent's own funds when he was not even a shareholder of Ever Yield. The appellants also complained that the source of the substantial sums allegedly loaned by the respondent and the true motive for having done so were not even established.

[85] In our view, even though the arguments on the said inherent improbabilities were not unreasonable – such as whether the respondent would lend such large sum without any documentation or any form of security for its repayment; in fact without any term for its repayment and without interest, as well as without even ascertaining the purpose thereof, we found that based on the totality of the evidence, there was much support for the case for the respondent as the plaintiff who was making the claim.

[86] We reiterated our observation in particular that absolutely no issues were raised in the trial or in the pleadings on the status of the audited financial statements of the relevant companies, all of which were signed by two directors as required under the Companies Act 1965 in force then. The audited statements for Ever Yield for example, for the financial year ended 30 April 2013 did record an amount of RM7,184,869 as being amount due to directors, which the relevant note stated that the amount due to the directors was unsecured, interest free and had no fixed terms of repayment. The figure recorded for the financial year 2014 was RM3,531,612.

[87] There were also no audit queries on any such transactions. The questions on the source of these large sums of money said to have been extended by the respondent to the companies, on the terms of repayment and security, or on the motives for doing so despite the respondent not being a shareholder of Ever Yield are therefore, in our view, given the context, not relevant.

[88] In relation to the issue of the RM769,569.84 cheque to exchange with cash in Ever Yield, the appellants argued that the only evidence presented by the respondent to prove his claim were the cheques themselves and his

own testimony. Because of that the appellants maintained that since it was the respondent who alleged that he had given the cash for the cheques issued by the accountant and it was also the respondent who said that he had given the cash to the accountant, it was therefore for him, and not the appellant to call the accountant to give evidence to corroborate the respondent's case, without whose evidence, the case of the respondent could not be established.

[89] As such, the appellants contended that Ever Yield had no evidentiary duty to produce the accountant as a witness or make available any company documents such as cash ledgers to rebut the case of the respondent as the plaintiff.

[90] We note from the appeal records nonetheless, which cannot escape our attention – and this is crucial – that there was no real challenge during the cross-examination of the respondent when he testified that he gave the cash to the appellants in exchange for the cheques.

[91] The respondent testified that the cash was given to the appellant. The appellant did not cross-examine this contention other than it was put to the respondent that he had no proof that he had given his own cash to Ever Yield in exchange for the cheques, in response to which the respondent clearly expressed his disagreement. The appellant company however chose not to call any of the accounts department staff to deny having received the cash.

[92] In our judgment, the respondent had laid sufficient foundation in adducing sufficient evidence to establish his case as pleaded. The respondent testified that these cash cheques had been given to him in exchange for his personal cash. He stated that if these cash were not given back to him by Ever Yield, the accounts in Ever Yield would not balance. This should be able to be readily detected by the accounts department or by the auditors. He also gave evidence that the payment vouchers for these cheques and payment are with the accounts department. We have also adverted to the audited financial statements of Ever Yield for the financial years ended 30 April 2013 and 30 April 2014 which did record amounts being due to directors which was within sums claimed by the respondent.

[93] Again, notwithstanding all that, and despite what the respondent had said in evidence, the appellant – Ever Yield – could have easily called witnesses under its employment from the accounts department and auditors who had done work for the company then to counter the case of the respondent. But the appellant did not.

[94] In addition, Chong Pit Yun (DW5) who was the treasurer for the subsidiaries of the Sit Seng & Sons in Sabah testified that Ever Yield had a standing procedure for cheques to be issued and accounted for in the company's accounts together with payment vouchers which would be checked, verified and approved for payment by different parties. Lim Boon Huat (DW6) who was the group director of finance for the Sit Seng & Sons

group of companies during cross-examination also confirmed the existence of the payment voucher and ledger entry in the company accounts but did not produce them. The company accountant was not called to rebut the respondent's case.

[95] It cannot be emphasised enough that the respondent was at the material time relevant to the claim period not the only director on the board of Ever Yield (or the boards of the other appellants, for that matter). The late Tan Sit Seng's sons, Tan Aik Hong, Tan Aik Hooi and even one of the present director, Tan Aik Chong were also directors of Ever Yield at that material period. But none of them was called to support the case of the appellants and challenge the testimony of the respondent.

[96] A key contention of the appellants was that up to his removal as director and suspension of his executive position, the respondent was in complete control of the appellant companies, and the staff were answerable to him. This state of affairs, according to the appellants enabled the respondent to get himself involved in all the irregularities and misconduct alleged of him.

[97] Consistent with the findings of the learned High Court Judge, we nevertheless noted that there were two aspects of the level or degree of control wielded by the respondent in these companies. The first was that the key shareholder in these family related companies under Sit Seng & Sons was Tan Sit Seng, who with his sons – Tan Aik Hooi, Tan Aik Hong and Tan Aik Chong – had the majority shareholding of Sit Seng & Sons and in the membership of the board of directors of Sit Seng & Sons and the other appellant companies. They were the ones who were in control, particularly Tan Aik Hong (as well as Tan Aik Hooi, who was based in Sandakan) and thereafter continued to control and manage the appellants after the demise of Tan Sit Seng.

[98] Secondly, the respondent did not have direct control of the accounts of the companies which were under the responsibility of the office manager, one Mr Fu Yuk Vui. There was no denying that the accounts were all audited and it was equally indisputable there were no evidence of any issues of misappropriation and siphoning of company funds at all. Not from the auditors, any of the shareholders or directors of the companies, or by Mr Fu. The evidence showed that it was only after the respondent claimed the monies due to him in this action that these allegations were raised for the very first time against him.

[99] Thus it ought also not to be overlooked that as submitted by the respondent, the allegation that he had taken company funds for his own use was only raised after he filed the present action to claim the sum. The assertion by the respondent that this showed an afterthought on the part of the appellant should not be construed to be without basis, more so when the essence of this allegation against the respondent, that he had committed the tort of conversion has been shown to be largely unsubstantiated.

[100] Based on the findings made by the High Court, we agreed that there was sufficient evidence adduced by the respondent to support his claim whilst there was the clear absence of true rebuttal evidence from the appellants. The finding of the learned High Court Judge that the respondent as the plaintiff had established his case on a balance of probabilities is not one which is inflicted with any appealable error.

[101] As such, we found no valid basis for appellate intervention in respect of the decision of the High Court allowing the respondent's claim for the balance of the loan in the sum of RM3,512,000 he had extended to Ever Yield (having loaned Ever Yield a total of RM12,300,000 in cash in the period between 11 September 2012 and 20 October 2014), and his claims for cash of RM769,569.84 in exchange for cheques in Ever Yield between 26 September 2014 and 15 October 2014. The decision of the High Court in this respect was thus affirmed.

Damages In Lieu of Notice

[102] The High Court did not grant the declaration prayed for by the respondent that the termination of the respondent's executive position in Ever Yield, Aikbee, Belutanian, Sapatanian, Realwood and Lubah Plantation was not valid. But the High Court nonetheless ordered in favour of the respondent payment of damages *in lieu* of notice, on account principally of the lack of due inquiry prior to termination, which the respondent was held to have been entitled to.

[103] We found merits in the arguments of the appellants on this aspect of the decision of the High Court, for a number of reasons.

[104] It was not just that the determination by the trial court on the length of period of the executive position served by the respondent in the case of Sapatanian, Realwood, Belutanian and Lubah Plantation to have been erroneous. Here, the errors were significant as the learned High Court Judge had determined the relevant period for compensation to be 14 years for the respondent's executive position for each of these four appellant companies despite the respondent's own statement of claim pleading that he had only held that position in those companies since January 2014 until his termination on 30 October 2014. This represented a far shorter period of only about ten months.

[105] The other issue with the finding of the High Court is on its reliance on the Supreme Court case of *Said Dharmalingam Abdullah v. Malayan Breweries (Malaya) Sdn Bhd* [1997] 1 CLJ 646 to justify the award of damages by reason of the absence of due inquiry before termination. This, as was highlighted by the appellants, with whom we agreed, was however less than accurate since that case held that natural justice does not apply in the relationship of master and servant unless the employment is in the public

service or where statutory or other protection is conferred. As example of the latter is *Said Dharmalingam* itself, where the Employment Act 1955 applied under which s. 14(1) plainly afforded a right to due enquiry. But not the instant case.

[106] Edgar Joseph Jr SCJ in *Said Dharmalingam* stated thus:

> Speaking generally, where the relationship is that of master and servant, we are normally in the field of the Common Law of contract, and so, the principles of administrative law, which, of course, must include the fundamental rule of natural justice expressed in the Latin maxim *audi alteram partem* (hear the other side) would not apply. On the other hand, where the employment is in the public sector, or where statutory or other protection is conferred, procedural safeguards will have to be observed.

[107] Furthermore, Industrial Court jurisprudence states that the failure to hold a domestic inquiry is not necessarily fatal and is curable by an inquiry in the proceedings in the Industrial Court (see the Federal Court decision in *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344).

[108] The one other reason why this decision of the learned High Court Judge could not be sustained is this. We noted that even though the High Court ruled that the Labour Ordinance (Sabah) Cap 67 did not apply to the respondent, and therefore he was not entitled to the termination benefits thereunder, or to damages to be assessed for wrongful termination which was prayed for, the court did however proceed to award the respondent damages as compensation for the termination without notice, despite it not being pleaded by the respondent in his statement of claim.

[109] The critical importance of parties and the court to be bound by the four corners of the pleadings of the litigants has been emphasised many a times by various judicial pronouncements of high authority. The relatively more recent Federal Court decisions in cases such as *Giga Engineering & Construction Sdn Bhd v. Yip Chee Seng & Sons Sdn Bhd & Anor* [2015] 9 CLJ 537, in *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944 and earlier judgments like in *Ong Ah Long v. Dr S Underwood* [1983] 2 CLJ 198; [1983] CLJ (Rep) 300 have all made it abundantly clear that plaintiffs are bound by their pleadings and should not be allowed to claim matters inconsistent with their own pleadings and to the unfair detriment to the defendants who had notice of the said pleadings.

[110] In any event, we considered it a valid proposition to maintain that any accusation of gross misconduct would be especially relevant to the question of the validity of the termination, including whether it would justify summary dismissal without notice (see *Menon v. The Brooklands (Selangor) Rubber Co Ltd* [1967] 1 LNS 100; [1968] 1 MLJ 15).

[111] Our evaluation found that the complete answer to the respondent's complaint on this ground is that termination of service may be lawfully pursued summarily in situations such as the present where the respondent as the employee had committed a serious misconduct in encashing the cheques amounting to RM6,554,931.43 despite having been removed as a director and more pertinently, suspended from his executive positions.

[112] For evidence showed that the respondent without the authority of Ever Yield had issued cheques (effectively had withdrawn funds) on Ever Yield's overdraft facility accounts with CIMB Bank Berhad and Public Bank Berhad, a total of ten cheques in the aggregate amount of RM6,554,931.43 on 29 October 2014. These monies were banked into his own account and into Tan Aik Hooi's account even though the respondent was no longer a director of the appellant companies and had been suspended from his executive positions.

[113] We were aware of the respondent's position that all the cheques were issued prior to 29 October 2014 and were claimed to be for sums that he was entitled to. However, we would here readily agree with the appellants that even if the respondent's assertions were factually correct, it was surely still inexcusably wrong for the respondent, despite his suspension which had taken effect the day earlier (and which he knew about) to have proceeded to encash the said cheques without notice to (not to mention consent of) Ever Yield.

[114] There is, in our view, much substance in the argument that the action of encashing company cheques for oneself during his suspension without prior approval is a form of gross misconduct warranting summary dismissal.

[115] We were also mindful of the respondent's submission that although it might be wrong for him to have issued the cheques and cashed the same (in the value of RM6 million) during his suspension as an executive (notwithstanding he thought he deserved or entitled to the monies), the High Court did refuse the declaration that the termination was unlawful but had the discretion to still award damages *in lieu* of notice as was done in the instant case.

[116] The respondent referred to among others the case of *Chiam Heng Hsien v. Jurong Town Corp* [1986] 1 CLJ 262; [1986] CLJ (Rep) 805; [1986] 1 MLJ 121, where despite the finding of misconduct, considering a service of about four years, the court awarded a three months' salary *in lieu* of notice for the termination. The prayer for a declaration that the termination was unlawful was dismissed but the court held that considering the circumstances of the case, a sum of three months' salary *in lieu* of termination notice was awarded.

[117] However, in that case, the misconduct was the employee taking up part-time employment elsewhere. That was manifestly different in nature from the misconduct before us, which concerned a former top executive in the appellant companies who had got involved in dealing with large sum of monies of the two appellant companies.

[118] In this respect, the English case of *Sinclair v. Neighbour* [1966] 3 All ER 988, referred to in *Menon* (*supra*), would in our view be more pertinent where the Court of Appeal held that the fact that the manager took money from his employer's till behind his back knowing that the employer would not consent constituted gross misconduct justifying summary dismissal (and notwithstanding that the manager replaced the money the day after).

[119] In that case where the appeal was allowed in favour of the employer, Davies LJ said:

> With the greatest respect to the judge, I think that he fell into error in attaching too much weight to the label and not enough to the facts. The facts were established. The fact that the manager took the money from his employer's till behind his back knowing that the employer would not consent was established; and it seems to me that it does not really matter very much whether that justifies the label 'dishonest' or not. The judge ought to have gone on to consider whether even if falling short of dishonesty the manager's conduct was nevertheless conduct of such a grave and weighty character as to amount to a breach of the confidential relationship between master and servant, such as would render the servant unfit for continuance in the master's employment and give the master the right to discharge him immediately.

[120] It was also held by Sachs LJ in the same case that it was well established that a servant can be instantly dismissed when his conduct is such that it not only amounts to a wrongful act inconsistent with his duty towards his master but is also inconsistent with the continuance of confidence between them. In our view both of these considerations have been met in the instant case given especially the seniority of the respondent's executive position, his suspension status (and removal from directorship) as well as the sizeable sum involved, all of which further underscored the gravity of the misconduct, which in our view in this case ought to have justified termination without notice.

[121] We therefore found on evidence that the respondent, after his removal as director in the appellant companies and during the suspension of his executive position, did commit an act of misconduct by encashing cheques of Ever Yield amounting to RM6,554,931.43 without authority. We construed the misconduct of cashing the said amount when he was already suspended reprehensible, which in our view justified the summary dismissal of the respondent without notice.

[122] As such, the claim for compensation for dismissal without notice which was allowed by the High Court against Ever Yield, Aikbee, Sapatanian, Belutanian, Lubah Plantation and Realwood is hereby set aside.

Counterclaim By Ever Yield, Sapatanian And Aikbee

[123] The learned High Court Judge had dismissed the respective counterclaims of Ever Yield, Sapatanian and Aikbee on the same ground, which was in the following terms – "In view of my decision on the plaintiff's claim, the defendant's counterclaim is dismissed". We would readily agree with the assertion of the appellants that the counterclaims were not connected to and separate from the respondent's respective claims. The learned High Court Judge, we could not disagree, was clearly erroneous in making such concluding statement.

[124] Thus even though it is well settled law that an appellate court will not intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision (see the Federal Court decision in *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785), here the complaint was the trial court was guilty of insufficient judicial appreciation of the evidence *vis-à-vis* the counterclaim.

[125] We do not think this is a necessarily fair observation because the grounds of judgment did reflect the analysis of the evidence undertaken by the learned High Court Judge. At the same time however, we were especially mindful of r. 5 of the Rules of the Court of Appeal 1994 which states that appeals shall be by way of rehearing. It is also often described as a continuation of a trial which is treated as a rehearing. And in *Kabushiki Kaisha Ngu v Leisure Farm Corporation Sdn Bhd & Ors* [2016] 8 CLJ 149, Zulkefli Ahmad Makinudin CJ (Malaya) (later PCA) writing for the Federal Court, held:

> [16] We also agree with the Court of Appeal's finding that it had considered the clear provisions under r. 5 of the RCA 1994, and holding that r. 5 of the RCA 1994 provided for an appeal to be lodged against the whole or part of any judgment or order of court, and such an appeal in contrast to a cross-appeal is by way of a re-hearing. The word "re-hearing" used clearly anticipated a review or regurgitation before the appeal court of all the points and arguments taken at the court below. Hence, if it was the substantive finding of the court that was intended to be attacked, it behoved upon the party aggrieved to file a proper notice of appeal.

[126] As such, there was no impediment for this court to examine and consider the evidence which had been adduced and points ventilated by the parties at the trial court in respect of the appellants' counterclaims which the learned High Court Judge had dismissed by attributing especially to the success of the respondent in proving his case in the main claim.

Counterclaim By Ever Yield – Cash Withdrawals Of RM2,845.154.85 By The Respondent

[127] It was Ever Yield's case as pleaded in its counterclaim that the respondent had made unauthorised withdrawals from Ever Yield's account for his own benefit on 14 occasions during the period between 25 March 2013 and 8 September 2014 totalling RM2,845,154.85, the first of which was on 25 March 2013 for the sum of RM1 million. In support of this counterclaim, Ever Yield had produced evidence of payment vouchers that those amounts were withdrawn from Ever Yield's bank account, during the time of the respondent's management of the appellant companies.

[128] In relation to Ever Yield's counterclaim of RM2,845,154.85 being withdrawals by the respondent in the period between 25 March 2013 and 8 September 2014, we found that there was merit in the claim by Ever Yield against the withdrawal of the RM1,000,000 under CIMB cheque 334807 which the respondent had initially denied taking.

[129] The respondent admitted only later during cross-examination when confronted with the copy of the relevant cheque which not only bore the respondent's signature but also showed that he cashed out the same. This was a copy of the cheque obtained from CIMB Bank which showed that the respondent did sign the cheque and in fact was the one who cashed out the RM1,000,000. Although the respondent later admitted having received the cash, he said it was petty cash for fresh fruit bunches (FFB) suppliers. However, the respondent did not call anyone in respect of the FFB claim to support his case.

[130] As for the rest of the sum of monies however, we observed that the company auditors did not raise any concerns with these withdrawals in the financial statements for the financial years ended 2013 and 2014. The cross-examination of Lim Boon Huat (DW6) who, as stated earlier was the group director of finance for the Sit Seng & Sons group of companies (who had not yet served the company at the material time) also showed he did not fully examine the payment vouchers, petty cash ledger and general listing ledger which by the double entry system would be able to detect where the money went to or how it was used in order to find out whether the cash was actually returned to the company as asserted by the respondent. The staff who actually prepared the payment vouchers were not called as witnesses.

[131] Reliance was only made by DW6 on the bank statements to show there was such withdrawals but the bank statements could not enlighten the court to whom and for what purpose the cash was withdrawn. After all, Chong Pit Yun (DW5) who, as mentioned earlier, was the treasurer for the subsidiaries of the Sit Seng & Sons in Sabah had testified that the respondent was the only person who could approve the payment vouchers, which as submitted by the respondent, probably explained why all the payment vouchers bore his signature.

[132] In any event it was also noted that for six of the payment vouchers, there were in fact two signatures in the column "recipients", which the one other was that of Mr Fu. DW6 also testified that some of these withdrawals were by the Mr Fu, the office manager of Ever Yield. Yet, Mr Fu was not called as a witness for the appellant to establish its counterclaim.

[133] We therefore allowed the counterclaim of Ever Yield in respect of the withdrawal of RM1 million only. The decision of the High Court was set aside to that extent only. We affirmed the decision of the learned High Court Judge on the dismissal of the counterclaim on the remainder RM1,845,154.85.

Counterclaims By Ever Yield And Sapatanian – Payments Made By Respondent For Yap Chye Lai And Yap Leong Wai

[134] As in the other aspects of this case this counterclaim also brings to the fore the issue concerning burden of proof. In arriving at his decision to dismiss Ever Yield's counterclaim for RM151,323.60 (being unlawful payments made to and for Yap Chye Lai and Yap Leong Wai) and Sapatanian's counterclaim for RM56,676.86 and RM23,176.80 (in total RM79,853.66) payments made to and for Yap Leong Wai, the learned High Court Judge, according to the appellants, misdirected himself by failing to apply the correct principle on the burden of proof that once the plaintiff gives such evidence as will support a *prima facie* case, the onus shifts on to the defendant to adduce a rebutting evidence to meet the case made out by the plaintiff.

[135] The appellants in this respect referred to the Federal Court decision in *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418, where Jeffrey Tan FCJ stated:

> [57] The rule is that "the onus of proof of any particular fact lies on the party who alleges it, not on him who denies it; *et incumbit probation qui decit, non qui negat, Actori incibit probation* … The plaintiff is bound in the first instance, to show a *prima facie* case, and if he leaves it imperfect, the court will not assist him. Hence the maxim *potior est condition defendantis*. A plaintiff cannot obviously advantage himself by the weakness of the defence. A plaintiff's case must stand or fall upon the evidence adduced by him. When, however, the defendant, or either litigant party, instead of denying what is alleged against him, relies on some new matter which, if true, is an answer to it, the burden of proof changes sides; and he, in his turn, is bound to show a *prima facie* case at least and, if he leaves it imperfect, the court will not assist him. *Reus excipendo fit actor* (*Woodroffe and Amir Ali*, *supra*, vol. 3 at pp. 3190-3191).

[136] Having evaluated the totality of the evidence, we cannot but agree with the appellants. Consistent with the counterclaims, it was in fact admitted by the respondent not only that both Yap Chye Lai and Yap Leong Wai were not under the employment of Ever Yield and Sapatanian

respectively, but that monies had also been paid allegedly as salaries and non-existent contracts, statutory deductions paid to the Lembaga Hasil Dalam Negeri, Employees Provident Fund ("EPF") and SOCSO – in favour of Yap Chye Lai by Ever Yield on various dates on ten occasions totalling RM151,323.60; and to Yap Leong Wai by Sapatanian in the total sum of RM79,853.66.

[137] It was also not denied that both Yap Chye Lai and Yap Leong Wai were the nephew and son respectively of the respondent and neither of the two were blood relatives of the late Tan Sit Seng.

[138] In our view, Ever Yield and Sapatanian had, based on the above successfully discharged their burden of demonstrating the evidence supporting their pleadings in the counterclaim, such that the onus had thereafter shifted to the respondent to rebut that those payments were wrongful.

[139] In this connection, we need only be reminded of the lucid explanation by Salleh Abas FJ (later LP) on this aspect in *International Times & Ors v. Leong Ho Yuen* [1980] 1 LNS 31; [1980] 2 MLJ 86, who stated:

> For the purposes of this appeal it is necessary to bear in mind the distinction between the two senses in which the expressions burden of proof and onus of proof are used (*Nanji & Co v. Jatashankar Dossa & Ors* AIR 1961 SC 1474, 1478 and *Raghavamma v. Chechamma* AIR 1964 SC 136, 143). The first sense, signified by the expression burden of proof such as referred to in section 101 of the Evidence Act is the burden of establishing a case and this rests throughout the trial on the party which asserts the affirmative of this issue. The appellants in the present appeal relied on justification and fair comment. Therefore, the burden of proving these defences rests entirely upon them (*Gatley on Libel and Slander*, 7th Ed, paras 351 and 354). *The second sense referred to as onus of proof, on the other hand, relates to responsibility of adducing evidence in order to discharge the burden of proof. The onus as opposed to burden is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to sections 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail.*
>
> (emphasis added)

[140] This was later also described by Augustine Paul JC (as then was) in *Aziz Muhamad Din v. PP* [1997] 1 CLJ Supp 523; [1997] 1 BLJ 523 in the following terms:

> The burden of establishing a case must be contrasted with the burden of introducing evidence (the evidential burden). The former is governed by s. 101 of the Evidence Act 1950 which states that:
>
> (1) Whoever desires any Court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

The latter is governed by s. 102 of the Evidence Act 1950 which states that:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

The burden of establishing a case rests throughout the trial on the party who asserts the affirmative. However, the burden of introducing evidence in a case shifts constantly as evidence is introduced by one side or the other.

[141] In this regard, we should additionally refer to the leading decision of the Court of Appeal in *Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1 which reaffirms the rule that "he who asserts must prove", whereby Siti Norma Yaakob JCA (as she then was) instructively held as follows:

He who alleges must prove such allegation and the onus is on the appellant to do so. See section 103 of the Act. Thus, it is incumbent upon the appellant to produce Tan Sri Basir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Basir as a witness does not shift the burden to the respondent to produce the witness and testify as to what he had uttered, as firstly, the respondent never raised such an allegation and, secondly, has denied even making one. For this very reason, the adverse inference under section 114(g) of the Act relied upon by the appellant cannot be accepted as establishing that if the witness had been produced, his evidence would work against the respondent. There is no obligation in law for the respondent to produce the witness as that obligation rests with the appellant, the party who alleges, and the fact that the appellant was unable to do so is fatal to his case. For this very reason too, the adverse inference under section 114(g) is invoked against the appellant.

[142] A useful example of how this concept was applied may be found in the Court of Appeal decision in *Ho Hup Construction Company Bhd v. Woo Thin Choy* [2015] 9 CLJ 706, where focus was made on whether the evidence had been made available to support the assertions in the pleadings, first of the plaintiff, then of the defendant, and its nexus to situations where an adverse inference may be drawn against a litigant for the non-calling of a witness whom he had mentioned in his version as pleaded. The essence of the following self-explanatory passages is especially important:

[47] *In our view, the starting point to answer the question whether the learned trial judge was correct in the rulings, as Her Ladyship did, was an examination of the two pleadings filed by the parties and their respective allegations therein.*

[48] *It could not be disputed that the plaintiff had adduced evidence both oral and documentary to prove their several allegations set out in their statement of claim.* This had been accepted by the learned trial judge, and in fact, even substantially conceded to by the defendant (as discussed above). The

material aspects of the plaintiff's case that had been proved was that USD1.5 million had been drawn out by the defendant personally from the plaintiff's bank account at Madagascar, that the defendant was the originator of the request to the plaintiff for a further sum totalling USD1.0 million to be paid to Intergood, of which company the defendant was the sole shareholder and director at the material time. It was the plaintiff's case that the defendant had misled and/or wrongfully given the impression that the sum of USD2.5 million had been paid to account or on instructions of BPHL, when BPHL was not even a legal entity; further there was no proof BPHL had even rendered any services to the plaintiff.

[49] *An examination on other hand, of the statement of defence filed by the defendant would clearly show that it was the defendant who had raised the name of Vincent Lye and another, namely, Andre Haja Resempa, the Secretary General of the President of Madagascar, as the material persona in the lead up to the SA and for the inclusion of "BPHL" to be paid the alleged USD2.5 million from the agreed settlement sum*. In his oral testimony the defendant also stated that all the impugned payments out of the plaintiff's monies that he was party to were instructed, authorised and/or done with the knowledge of Vincent Lye. In his testimony in court it was also the defendant's claim that the instructions to incorporate Intergood and to disburse the funds remitted to that company was done by him on the instructions of one Josiane Arinala allegedly of "BPHL", who was not mentioned even in his statement of defence or witness-statement in the first place.

[50] *It was definitely incumbent on the defendant as the person alleging the existence of those asserted facts to call Vincent Lye and/or Andre Haja Resempa (and/or even Josiane Arinala) in support of the pleaded defence and further to rebut the plaintiff's evidence that had been adduced in court*. This duty on the defendant was somewhat recognised by the learned trial judge herself but the court went on to however refuse to apply the presumption against the defendant for failing to produce Vincent Lye, the principal witness for the defendant as would appear from the averments in the defendant's own statement of defence, to support/corroborate the defence.

[51] *It was clearly not for the plaintiff to secure the attendance of Vincent Lye as the plaintiff's witness. Vincent Lye's evidence was only material to the defendant's case or the defendant's version of matters that had transpired, which he wanted the court to believe. The plaintiff had already adduced sufficient evidence both oral and documentary to discharge the burden of proof to establish as facts what had been pleaded in the statement of claim (ss. 101, 102 EA). It was the defendant who failed to discharge the onus on him as required by s. 103 EA*. (emphasis added)

[143] Reverting to the instant case before us, since it was the respondent who relied on his allegation that Tan Sit Seng had consented to the payments to the former's son and nephew, applying s. 103 of the Evidence Act 1950 and the above-stated cases, the onus would lie on the respondent to prove that fact. It cannot be that it should instead be for Ever Yield and Sapatanian to disprove the respondent's assertion when the respondent had not discharged his burden to prove his assertion in the first place.

[144] It was as such difficult to agree with the learned High Court Judge who dismissed the counterclaim when the respondent's only explanation for the impugned payments was that those payments were allegedly made with the consent of the late Tan Sit Seng and that payments of salary had also been made to the children and grandchildren of Tan Sit Seng, including the respondent's son, Yap Leong Wai, and the respondent's nephew Yap Chye Lai, even though they were not in actual employment. In support of that assertion, the respondent however only showed EPF statements for the years 1994 to 1997 without more which he claimed were evidence of payment to Tan Aik Thor (who was Tan Sit Seng's son) while Tan Aik Thor was studying in Australia.

[145] There was no documentary or other evidence to substantiate the respondent's testimony that Tan Sit Seng consented to such payment to Yap Chye Lai and Yap Leong Wai. Whatever document which showed payments of company funds to Tan Sit Seng's son, Tan Aik Thor for family purposes, did not, in our view, at the same time prove that Tan Sit Seng had, as the respondent claimed, consented to the payments to the respondent's nephew, Yap Chye Lai and his son, Yap Leong Wai, neither of whom were blood relatives of Tan Sit Seng.

[146] The learned High Court Judge had therefore erred in holding that it was for Ever Yield and Sapatanian to call witnesses to rebut the contention of the respondent that similar payments were made to family members when they were not under employment of the companies and for the appellants to give evidence as to the identity of the person who instructed the payment to be made to both of Yap Chye Lai and his son, Yap Leong Wai.

[147] It should also be reiterated that even though the High Court did not find that these payments were made on the instruction of the respondent or that these payments were converted to the respondent's own use, it cannot be denied that these were made on the approval of the respondent as an authorised signatory. The payments to Yap Chye Lai were made between 2007 and 2014 and to Yap Leong Wai between January 2013 and October 2014, which were during the period they were not under the employment of the said companies. There is no legitimate and lawful basis for these to be approved by the respondent for payments to the two who had no connection to the companies. The respondent, as a director of these companies owed a fiduciary duty under the law to act in the best interest and for proper purpose of the companies he served.

[148] A number of facets to the requirements governing the discharge of the role of a director as a fiduciary is enacted in the Companies Act 1965, chief amongst which is the most fundamental duty to act in good faith in the best interest of the company under s. 132(1) and the prohibition against improper use of company's property, position, corporate opportunity or competing with the company under s. 132(2). Very clearly, by approving these specific

payments to the respondent's son and nephew out of the funds of Ever Yield and Sapatanian, the respondent had violated this statutory and fiduciary responsibility.

[149] As such, Ever Yield's counterclaim for RM151,323,60 and Sapatanian's counterclaim for the aggregate sum of RM79,853.66 were allowed. The decision of the High Court on this was set aside.

Counterclaim By Ever Yield For Proceeds Of Sale Of Sludge Oil

[150] The appellant company, Ever Yield contended that the respondent was involved in a sludge sale transaction by Ever Yield to Tegap Bumijaya Sdn Bhd ("TBSB") which on record had been done at an undervalue when in fact the respondent benefitted from the difference in price at the true value. The learned trial judge made a finding of fact that the appellant had not proven on a balance of probabilities that it was entitled to claim from the respondent the sum of RM1,287,712 being the alleged proceeds of sludge oil sold. The appellant argued that there was not a proper evaluation of the evidence at the High Court.

[151] The appellant submitted that since Ever Yield had produced evidence that the invoices were in fact undervalued, there was no necessity for Ever Yield to call TBSB. Hence, the adverse inference ruled by the High Court for the failure of the appellant to call TBSB was wrong. The evidence of DW5, Chong Pit Yun too was wrongly rejected. The appellant also took objection to the alleged failure by the High Court to appreciate that the respondent's denial of having knowledge of the sale of the sludge oil was incredulous when by his own admission he was in charge of the operational affairs of the mill, plantation and office.

[152] We observed from the appeal record however that the respondent's principal defence to this counterclaim was that he was not involved at all in the sale of sludge. The evidence analysed by the learned High Court Judge in our view, supported this defence. Now, evidence showed that TBSB had paid in full the amount invoiced to them and banked the money into the appellant's bank account as agreed.

[153] It was found that it was the assistant mill manager, Mr Chua Tang Guan, who was involved instead and the relevant contract with TBSB was also entered into by him on behalf of the appellant. However, Mr Chua Tang Guan was not called as a witness for the appellant to challenge this defence. Neither was anyone called from TBSB to give evidence to show, as contended by the appellant, that the respondent was indeed involved in the sale of the sludge and that the money was then paid to him, let alone on the actual sum in dispute.

[154] It should be stated that even though the documents on the invoices tendered by Ever Yield as the plaintiff in the counterclaim might well show undervalued sale numbers, the appellant's assertion was that in fact the

transaction was done at a higher value (and the differential sum siphoned by the respondent). In other words, the appellant maintained that the sale delivery of the sludge was not as stated in the delivery order and invoices. But crucially, there was no documentary evidence to support such contention except for the oral evidence of DW5 who allegedly was told to prepare the alleged ledger. The High Court was therefore correct in holding that TBSB would provide the best evidence on this point. But since nobody from TBSB was called to achieve this, the High Court correctly drew adverse inference against the appellant for such omission.

[155] It was also pertinent to note that both DW5 and DW6 also testified that they did not make any enquiries with TBSB on the matter, and that in any event, DW6 did not even carry out any proper investigation on this matter to show that the respondent had a role in the sale of the sludge. There was also a letter written by Mr Fu which appeared to suggest impropriety on the part of the respondent in this transaction but Mr Fu had subsequently affirmed in a statutory declaration that he was forced to write the same by certain parties and had also lodged a police report in that respect.

[156] We therefore found no merit to interfere with the High Court's dismissal of Ever Yield's counterclaim for RM1,287,712 said to be proceeds of sale of sludge oil, *vis-à-vis* the allegation on undervalued invoices, primarily on account of the adverse inference drawn against the appellant for the failure to call the buyer in that transaction.

[157] The decision of the High Court dismissing this counterclaim was affirmed.

Counterclaim By Aikbee – (i) RM200,000 Cash To Respondent

[158] The counterclaims by Aikbee were for three different amounts. The counterclaims, all three of them, concerned the allegation that the respondent had wrongfully converted the sums of RM200,000, RM440,000 and RM438,723.63 respectively as his own.

[159] The first was for RM200,000 being cash drawn in favour of the respondent's account. The counterclaim, as pleaded, was that the respondent had on or about 23 March 2013 wrongfully caused cash in the sum of RM200,000 to be drawn from the company's account, in the respondent's favour.

[160] But as highlighted by counsel for the respondent, three witnesses for the appellant company, namely Wong Yee Sa (DW4), the account assistant of Aikbee, DW5 and DW6 during cross-examination admitted that this RM200,000 was withdrawn by the respondent from his own personal account with the company. All three during cross-examination testified to such effect.

[161] It was, in other words, the respondent's own money which he had kept with the company.

Counterclaim By Aikbee – (ii) RM440,000 Cash To Sit Seng & Sons

[162] The second was the counterclaim for RM440,000 being cash drawn on account of Sit Seng & Sons. The RM440,000 was alleged to have been drawn from the company's accounts in favour of Sit Seng & Sons, which sum was never received by the latter.

[163] We observed however whilst evidence showed that the respondent did approve the payment, there is no basis to find that the respondent took the money for his own use. The only evidence was that he approved the payment. There was no evidence as to the identity of the recipient. Again here, since it was the appellant company, in this counterclaim, Aikbee, which made the allegation, the burden was clearly on the appellant to prove this claim.

[164] Yet despite allegedly having been informed of the accusation, DW6 did not have personal knowledge of the transaction since he only joined Sit Seng & Sons subsequent to the incident of the withdrawal. In any event, DW6 did not produce either the ledger, which would have shown whether the money was received by Sit Seng & Sons or the relevant cheque, which would have shown who had actually withdrawn the cash. Neither was DW5 of assistance to the case of the appellant since she was not working for Sit Seng & Sons in Kuala Lumpur.

[165] More significantly, despite the case of the appellant in its counterclaim being that Sit Seng & Sons never received such payment, the appellant called not a single witness from Sit Seng & Sons with the requisite knowledge of the transaction to give evidence to confirm or deny the appellant's own pleaded assertion that Sit Seng & Sons did not receive this payment. Persons who could well have been conversant with the facts such as Mr Fu, the office manager who was in charge of the company accounts was however also not called as a witness to show that the respondent did take the cash money.

[166] On top of that there was also no evidence of any issues being raised by the auditors for Sit Seng & Sons on this transaction. Neither was there evidence of any demand made by Sit Seng & Sons or by the appellant company for that matter, for this alleged non-receipt by Sit Seng & Sons of the RM440,000.

Counterclaim By Aikbee – (iii) RM438,723.63 Cash In Hand Of Respondent On Sale Of Sawn Timber

[167] The third counterclaim amount was for RM438,723.63. The appellant pleaded that as at 31 October 2014, there was a sum of RM438,723.63 of what was described as "cash in hand" – being monies received by the respondent for the cash sales of sawn timber by the appellant, which remained unaccounted for by the respondent.

[168] We agreed with the submission of the respondent that from the appeal record, there was however never any demand made by the appellant to the respondent for this sum until after the counterclaim was filed, where the allegation was first made, raising strong suspicions that the same was an afterthought.

[169] DW6, for the appellant, on the other hand confirmed that the said sum was in fact not held by the respondent as at October 2014. The testimony of DW6 further showed that there was no evidence that this was cash in hand held for the cash sale of sawn timber. And neither was there evidence that these money was received by the respondent. Whilst DW6 did tender documents to support the claim of the appellant company, none could be said to substantiate that these money from the cash sale of sawn timber was received by the respondent. Specifically, there was no evidence that at 31 October 2014, there was a cash of RM438,723.63 received by the respondent for cash sales of sawn timber by the appellant.

[170] Regardless, we observed that the respondent gave evidence that he had asked the appellant for particulars of this alleged sum of RM438,723.63. But appellant did not accede to the request.

[171] We found that the document on "certificate of cash fund held" only recorded that at a particular date, such cash fund was held. We agreed with the respondent's counsel that it did not show that as at 31 October 2014, there was a cash sum of RM438,723.63 received by the respondent for cash sales of sawn timber by the appellant.

[172] As such, Aikbee's counterclaims for the three amounts against the respondent were dismissed. The decision of the High Court was affirmed.

Conclusion

[173] In light of the foregoing analysis and findings, we allowed the appeal in part against the decisions of the High Court on the main claim and the counterclaims for the reasons set out earlier. The decisions of the High Court were accordingly set aside to such extent.

[174] For clarity, other than what had been referred to in these grounds of judgment, any other decisions of the High Court not addressed herein (not raised by the parties at the hearing) were affirmed.

[175] After hearing the parties on costs, we ordered costs of RM50,000 to the appellants subject to allocator.